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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Petitioner*,

vs.

ED. C. WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & COMPANY, SUCCESSOR TO ED. C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION, *Respondents*.

REPLY BRIEF ON BEHALF OF PETITIONER.

Reply to Brief of Respondent, Ed. C. Wright.

The contention of the petitioner is the same as the theory upon which the petition in bankruptcy was drawn, and its original brief in this case does not change the theory relied on in the Courts below as stated in the opening sentence of the brief of respondent Wright.

The City's contention is that the plan of composition submitted to the court for confirmation is set forth in its entirety in Ordinance No. 269, as amended by Ordinance No.

289; that this plan of composition has been partially completed by the exchange of old obligations for refunding securities with over 90% in amount of its creditors; that the City, during the period of the voluntary refunding, purchased from some creditors with assets that were not pledged to the servicing of the refunding securities, some of the debts included in those to be refunded under the plan and that in so doing it did not violate any of the provisions of the bankruptcy law, and that it is now entitled to a confirmation of this refunding plan, as a plan of composition in bankruptcy. In the petition, the City showed that at the time of filing the petition it owned, held and controlled the obligations purchased by it from some of the creditors (R. 4-5), and that it had paid some of its obligations out of proceeds from special earmarked tax levies made pursuant to peremptory writs of mandamus issued by the district court (R. 42-53). The petition was filed for the purpose of submitting the plan of refunding as a plan of composition in bankruptcy to deal with the outstanding existing unrefunded debts of the City as of the time of filing the petition.

The brief on behalf of respondent Ed. C. Wright is premised upon several erroneous assumptions, which are not supported by the record in this case, or by the law controlling the case and the decisions interpreting the law.

The first erroneous premise is that the "plan of composition" before the court is the "over-all settlement program" of the petitioner as evidenced by the plan of composition set out in Ordinances 269 and 289, and by all of the contracts entered into between the City and its creditors and between the City and its representative, employed for the purpose of negotiating and putting into effect the plan of refunding.

That the "over-all settlement program" of a municipality as evidenced by its plan of refunding and all contracts in connection therewith, is not the plan of composition is best

evidenced by the fact that in the amendment to the Municipal Bankruptcy Act, approved June 22, 1940, Chapter 438, there was added to Section 83 (e) of the Act a requirement that

> "the judge shall carefully examine all of the contracts, proposals, acceptances, deposit agreements, and all other papers relating to the *plan*, specifically for the purpose of ascertaining if the fiscal agent, attorney or other person, firm or corporation promoting the *composition*, or doing anything of such a nature, has been or is to be compensated, * * *." (Emphasis ours.)

The "plan of composition" in this cause is the plan set forth in Ordinance 269 as amended by Ordinance 289. The contracts with the Barker Committee and with other creditors which were executed and consummated by the exchange of bonds held by such creditors, and the contract with Exselsen fixing his compensation, the time when the same shall be paid, and the services which it shall cover, are not a part of the plan.

These contracts are appropriate evidence in the cause to determine, whether or not, the petitioner has complied with other requirements of the Municipal Bankruptcy Act or violated other provisions of the Bankruptcy Law.

Another erroneous assumption in the brief of respondent Wright is that throughout the brief, counsel for Wright have used the quoted word "consummated" as if it had been used in the plan of composition and in the contracts with the creditors with the intent that the plan of refunding should be consummated when exchanges were made with the several creditors who had signed contracts. The word "consummated" is used in the contract with the Barker Committee (R. 1477, 842), but it is used with reference to consummating *that contract* and not completing the plan of refunding.

The word is also used in the contract with Exselsen (R. 1470, 842) but there it also refers to consummating the contracts with the Barker Committee and with the other creditors who had signed the agreement dated December 24, 1936. No where in any of the contracts relating to the plan of refunding, nor in the plan of refunding is there any language indicating that the City and its creditors intended to or did "consummate" the plan of refunding when it made exchanges with over 90% of its creditors in September 1939.

Davis v. *City of Homestead*, 5 Cir., 112 F. (2d) 438, certiorari denied, 311 U. S. 678, 85 L. Ed. 436, 61 Sup. Ct. 45.

We have already pointed out in our brief on pages 51 to 58 why we contend that the record supports the finding of the special master, the district judge, and Mr. Justice Waller to the effect that the plan was not consummated in September, 1937.

Another fundamental error in respondent Wright's brief is that counsel confuse a "preference" which will result to a creditor from the complete consummation of a plan of composition with a "preference" caused by the payment of a creditor prior to the filing of a petition for the confirmation of a plan of composition, dealt with in Section 60 of the General Bankruptcy Act. 11 U. S. C. A. section 96.

The first type of "preference" may result from specific provisions in the plan of composition itself, or from the position of a creditor because of special contracts with the petitioning city, *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U. S. 138, 61 Sup. Ct. 157, 85 L. Ed. 91, or because of the particular situation of the creditor with reference to the petitioning city. *Kaufman County Levee Imp. Dist. No. 4* v. *Mitchell*, 5 Cir., 116 F. (2d) 959; *Town of Belleair, Fla.*, v. *Groves*, 5 Cir., 132 F. (2d) 542,

certiorari denied, 318 U. S. 769, 87 L. Ed. 623, 63 Sup. Ct. 762.

As pointed out in the last above cited cases and in our brief on pages 47-48, the fundamental reason why a plan of composition cannot be confirmed when creditors who are consenting to the plan will receive as a result thereof a discriminatory preference over dissenting creditors, is that such action would constitute a fraud upon the dissenting creditors.

It is this type of "preference" which the Municipal Bankruptcy Act prohibits in section 83 (e) where it says that the court shall determine that the plan "does not discriminate unfairly in favor of any creditor or class of creditors."

The plan of composition submitted to the court in this cause, being Ordinance 269 as amended by Ordinance 289, does not contain any such preference and counsel for the respondent Wright does not contend that it contains such a preference.

There is nothing in the situation of any of the consenting creditors that will place them in a preferential position over that of the dissenting creditors. We have discussed this fully in our brief on pages 43 to 51, under the proposition that "There is no lack of identity of interest of the creditors consenting in the instant case with the respondents who would be compelled by their consents to accept the plan of composition."

Counsel for respondent Wright complain of the alleged discriminatory preference to the former creditors of the City whose claims were purchased by the City more than a year prior to the conversion of the plan of refunding into a plan of composition in bankruptcy by the filing of the petition in this cause.

If a preference at all, these transactions are preferences dealt with in section 60 of the General Bankruptcy Act. 11

U. S. C. A. sec. 96. We have already pointed out in our brief on pages 35 and 39 why these purchases of securities by the City, or, as contended by respondents, preferential settlements of claims by the City, are not such preferences as will prevent the confirmation of the plan of composition.

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. (2d) 922, certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 Sup. Ct. 59.

We have also pointed out in our brief, pages 23-26 and 45-47, that the result of these purchases was not a depletion of the assets of the City pledged to the servicing of the refunding securities, but, on the other hand, the purchases materially increased the tax collecting power of the City and thereby benefited the objecting creditors and the consenting creditors in the same manner and to the same degree.

In respondent Wright's brief, pages 20 to 24, counsel contrast the situation of the six judgment creditors with the situation of respondents in attempting to show that the interlocutory decree violates the fundamental rule of equality between creditors.

This is an incomplete statement of the rule.

A complete statement of the rule is that bankruptcy requires an equality between all creditors as to their debts existing at the time of filing the petition.

Taylor v. *Provident Irr. Dist.*, 9 Cir., 123 F. (2d) 965.

There is a limitation to this rule in general bankruptcy by the provisions of section 60 (11 U. S. C. A. 96) which authorizes the setting aside of any payment or preference to any creditor if it were made within four months prior to the filing of the petition. This, however, does not apply in Municipal Bankruptcy because in subsection 83 (c) the power of the bankruptcy court to restrain creditors from

enforcing their claims does not apply "where rights (of creditors) have become vested". The judgment creditors have a vested right to payments on account of their claims received by them prior to the filing of the petition. The interlocutory decree applies the rule of equality to the balances due to each of said judgment creditors as of the date of filing the petition.

In the *City of Vero Beach* case (104 F. (2d) 59) the court determined what rights of judgment creditors were not vested rights and the interlocutory decree does not violate the holding in said decision.

This treatment of the judgment creditors does not injure the respondents.

The answer to the reductio ad absurdam argument on page 30 of respondent's brief is that a petitioning city must show that it is not able to pay its debts as they mature. This showing could hardly be made when it had refunded 66⅔% of its debts and paid 33% in full and had only ⅓ of 1% left unrefunded.

REPLY TO BRIEF OF RESPONDENT, AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE.

Counsel for the respondent Bank also fails to distinguish between a preference resulting to a consenting creditor from a completion of a plan and a preference to a former creditor by payment or settlement prior to the filing of a petition in bankruptcy, which we have covered hereinabove.

Counsel for the Bank in their brief complaint of the reduction in the minimum tax levies as being an abandonment and violation of the plan of refunding and a reduction of the amounts which should have been paid into the tax participation certificate fund (pages 8, 17 and 27) and misinterpret the plan and this portion of the City's operation under it.

The minimum tax levy required under section 8 (R. 72) of the plan is for the purpose of servicing all of the refunding securities authorized to be issued under the plan. By peremptory writs of mandamus the City was required to service 1.84% of the debts covered by the plan with special earmarked tax levies (R. 779). If the City had levied the full millage required under the plan there would have been double taxation for this 1.84% of its debts, so the minimum levy was reduced 1.84% to avoid this violation of the rights of taxpayers. The judgment debts did not and will not under the interlocutory decree participate in the proceeds from the minimum debt service taxes levied prior to the filing of the petition in this cause, either in interest payments or payments in reduction of tax participation certificates. The respondents will receive the same proportionate amounts in interest and reduction payments as have been received by the consenting creditors (pages 18 and 44

of original brief). These amounts were not reduced by the servicing of 1.84% of the total debts by special levies during the fiscal years 1937-38 through 1939-40. The interest payments are the same. Theoretically the surplus going into the tax participation certificate fund was 1.84% less than if the full minimum levy had been made but 1.84% less in amount of certificates participate in the prorata distribution of the fund.

Counsel also complain (page 18) that the City has not carried out the sinking fund requirements of section 9 of the plan (R. 74-78) but overlooked that these provisions do not become operative until the fiscal year 1945-46.

At page 12 counsel for the Bank purport to quote counsel for petitioner, but do not quote all of counsel's remarks *nor is the part quoted correct.* Counsel's complete remarks were:

> "Mr. Adams: We except to the form of the question because it doesn't conform to the testimony. The matters being testified about are purchases of securities by the City, and not settlements. If your Honor please, I make this objection here now to clarify this situation. From the trend of this cross examination it would appear that they are trying to develop the fact that the City settled and refunded these judgments on different bases, different percentages. What the City did was to purchase these securities at different percentages, it is true, but they were not settlements and exchanges made under the plan; they were purchases of securities" (R. 796-797).

Counsel for the Bank have not cited the record to support many statements in their brief which conflict with statements in petitioner's brief, and we submit that in these matters their statements are not supported by the record.

All other points made in the brief for the Bank have been fully covered in our original brief.

Respectfully submitted,

MORTON B. ADAMS,
IRA C. HAYCOCK,
D. H. REDFEARN,
Counsel for Petitioner.

Miami, Florida.

REDFEARN & FERRELL,
Of Counsel.